Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

N.B., by her Mother and Next Friend, D.G.,

Petitioner,

vs.

ALACHUA COUNTY SCHOOL BOARD, and ROBERT HUGHES, Superintendent, Alachua County School Board, Individually and in his official capacity; SUWANNEE COUNTY SCHOOL BOARD, and CHARLES F. BLALOCK, JR., Superintendent, Suwannee County School Board, Individually and in his official capacity; COLUMBIA COUNTY SCHOOL BOARD, and DIANE LANE, Superintendent, Columbia County School Board, Individually and in her official capacity,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

I. Is the doctrine of exhaustion of administrative remedies applicable when Plaintiff's had no administrative remedy for their claim for money damages for violation of the Individuals With Disabilities Education Act?

II. Is the doctrine of exhaustion of administrative remedies applicable when there is no final administrative decision because the State of Florida closed Plaintiffs' administrative complaint file when Plaintiffs moved to Georgia?

III. Is the doctrine of exhaustion of administrative remedies even applicable to Plaintiffs' cause of action pursuant to 42 U.S.C. §1983?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Appendix A - Opinion of the United States court of Appeals for the Eleventh Circuit Dated June 2, 1996 which includes the Memorandum Order of the United States District Court for the Northern District of Florida Filed July 20, 1995 . . . . . 1a

No.

In The

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, N.B., by her Mother and Next Friend, D.G., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 84F.3d 1367 and is reproduced in the Appendix filed herewith. The unreported opinion of the district court in this case is the appendix to the Eleventh Circuit decision.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY & REGULATORY LAW INVOLVED

This case is governed by the "Individuals With Disabilities Education Act" (I.D.E.A) 20 U.S.C. §1400 et. seq. The stated purpose of the act is:

> "to assure that all handicapped children have available to them, within the time period specified in §1412(2)(B) of this title, a free appropriate public education, which emphasizes special education and related services designed to meet their unique needs, to assure that the right of handicap children and their parents or guardians are protected, to assist states and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicap children." 20 U.S.C. §1400(c).

34 C.F.R. §300.552, entitled "Placements" was promulgated pursuant to the I.D.E.A., it states:

> "Each public agency shall insured that: (a) Each handicapped child's education placement: (1) Is determined at least annually, (2) Is based on his or her individualized education program, and (3) Is as close as possible to the child's home: (b) The various alternative placements included under §300.551 are available to the extent necessary to implement the individualized education program for each handicapped child; (c) Unless a handicapped child's individualized education program requires some other

arrangement, the child is educated in the school which he or she would attend if not handicapped; and (d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs."

STATEMENT OF THE CASE

N.B. was born on May 22, 1982. She has been hearing impaired since birth. She has no other handicap. As a hearing impaired person, she is entitled to a free and appropriate public education, pursuant to the Individuals with Disabilities Act (I.D.E.A.) 20 U.S.C. §1400 et. seq., hereinafter I.D.E.A. At all times relevant to this action, N.B. lived in either Columbia County or Suwannee County, Florida. Therefore, at all times relevant to this action, either the Suwannee County School Board or the Columbia County School Board was responsible for providing N.B. with a free and appropriate public education. At all times relevant to this action, either Defendant, SUWANNEE COUNTY SCHOOL BOARD or COLUMBIA COUNTY SCHOOL BOARD failed to provide N.B. with a free and appropriate public education either at her neighborhood school or at a school within her county of residence. Instead, they conspired with Defendant, ALACHUA COUNTY SCHOOL BOARD, to deprive N.B. of a free and appropriate public education: by segregating her from hearing students; and, by requiring her to ride a school bus from either 50 miles from Columbia or 80 miles from Suwannee counties to Alachua County on a daily basis. As a result of Defendants' actions, N.B., as an elementary school student, rode a school bus five to six hours per day to and from school. In addition to the interminable bus ride, N.B. missed a significant portion of each and every school day because the school bus was scheduled to both arrive late and leave early each day. This situation continued until the minor child moved to Georgia in August, 1993 at which time, despite a superior I.Q., N.B. was academically functioning several years below grade level.

On June 15, 1993 Plaintiffs' filed pro se administrative complaint against the Suwannee and Alachua County School Boards. On September 2, 1993 that claim was abated by the Florida Department of Education until such time as Plaintiffs' returned to Florida, if ever. On December 27, 1994, Plaintiffs filed an action for money damages against

the named Defendants. Plaintiffs evoked the court jurisdiction pursuant to 28 U.S.C. 1332(a)(1) and 28 U.S.C. §1343. Prior to service on the Defendants, Plaintiff amended her complaint on February 27, 1995.

On April 2, 1995, Defendants, SUWANNEE COUNTY SCHOOL BOARD and CHARLES F. BLALOCK, JR., filed an answer to the Amended Complaint. These Defendants did not present any defense in law or fact, by counter-claim, cross-claim, or third party claim, nor did they assert any of the Rule 12(b) defenses.

On June 9, 1995, Defendants, ALACHUA COUNTY SCHOOL BOARD, COLUMBIA COUNTY SCHOOL BOARD, ROBERT HUGHES and DIANE LANE filed a Motion to Dismiss Plaintiff's First Amended Complaint. The Motion to Dismiss set forth four grounds for dismissal:

1. Failure to exhaust administrative remedies;
2. The Statute of Limitations;
3. Failure to state a claim for which relief could be granted with regard to Count I; and,
4. Failure to state a claim for which relief could be granted with regard to Count II.

On July 21, 1995, the Honorable Maurice M. Paul, Chief Judge of the United States District Court for the Northern District of Florida entered an Order granting the Motion to Dismiss with Prejudice. In so doing, Judge Paul rejected Plaintiff's position:

1. That since she no longer resided within any one of the three school districts in question, there was no administrative remedy available, and

2. That because she is seeking money damages, the Defendants lack authority to grant the relief requested and so exhaustion would be futile.

In their Motion for Rehearing, which was denied by Judge Paul, Plaintiffs raised the issue of the abated administrative complaint.

On appeal, the United States Court of Appeals for the Eleventh

Circuit affirmed and adopted District Judge Paul's Memorandum Order.

REASONS FOR GRANTING THE WRIT

This court should grant the writ of certiorari in order to resolve a split between the Federal Circuit Courts of Appeal two important questions concerning the applicability of the doctrine of exhaustion of administrative remedies. The first issue presents a conflict in cases where Plaintiffs are alleging a cause of action for money damages for violation of a Federal right under the I.D.E.A. Such actions were approved by this court in *Franklin v. Guinett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed. 2d 208 (1992) wherein it was held that unless there was specific statutory language to the contrary there is always a right to damages for violation of a Federal right. The decision of the Circuit Court of Appeals for the Eleventh Circuit subverts that right by grafting onto it the requirement of compliance with the doctrine of exhaustion of administrative remedies. This decision conflicts with the Ninth Circuit's decision in *Hoeft v. Tucson Unified School District*, 967 F.2d 1298 (9th Cir. 1992) which held there can't be a blanket application of the doctrine and instead there must be an analysis of whether pursuit of administrative remedies under the facts of the given case will further the general purpose of exhaustion and the congressional intent behind the administrative scheme. In cases such as Plaintiffs where the Defendants school districts have overtly interfered with a child's right to a free and appropriate public education, the expertise of the school district is simply not an issue.

This case presents a second issue of the conflict between the decision of the Eleventh Circuit with regard to requiring Plaintiffs to exhaust their administrative remedies before pursuing their claim for damages pursuant to 42 U.S.C. §1983 and the decision of the Third Circuit in *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995) which held the doctrine was inapplicable.

Without a definitive ruling by this court with regard to the applicability of the doctrine of exhaustion of administrative remedies the actions or money damages under both the I.D.E.A. and 42 U.S.C. 1983 the various circuits will continue to reach divergent answers to these questions. As a result, there will be an uneven application of the law depending on what area of the United States a particular citizen resides

in.

Although the position of the Eleventh Circuit did not act within an absolute bar to the citizen's right to bring this action, it does have an extra and unnecessary layer of litigation with concommittent expenditure of cost and time, effort and energy. The decision of the Eleventh Circuit only serves to further insulate the local school board from responsibility for their actions.

I.

Is the doctrine of exhaustion of administrative remedies applicable when Plaintiff's had no administrative remedy for their claim for money damages for violation of the Individuals With Disabilities Education Act?

Judge Paul held that Plaintiffs have failed to exhaust their administrative remedies available to them under the I.D.E.A. and that this failure to exhaust precludes both Plaintiffs' I.D.E.A. and §1983 claims. Therefore, the essential question is whether Plaintiffs were required to exhaust their administrative remedies under the I.D.E.A. even though damages are not available to Plaintiffs in the administrative process.

This court pointed out in *Honig v. Doe*, 484 U.S. 305, 98 L.Ed. 2d 686, 108 S.Ct. 592 (1988), the necessity of the I.D.E.A. and its predecessor Acts and noted that Congress sought "to assure that all handicapped children have available to them. . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected."

Plaintiffs' concede that in most cases the I.D.E.A. requires exhaustion. However, there are exceptions to the exhaustion requirement. Specifically, parents need not avail themselves of the administrative process when: such a process would be inadequate or futile; the grievance challenges generally applicable school board policies that are contrary to recognized law; or, exhaustion will work severe harm upon the litigant. See, for example, *Learning Disabilities*

Association v. Board of Education, 837 F. Supp. 717, 722-23 (D. Md. 1993). As noted in Learning, the determination of whether one of these "narrow" exceptions is applicable depends upon "'whether the pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme.'" *Learning*, 837 F. Supp. at 723 (quoting *Hoeft v. Tucson Unified School District*, 967 F.2d 1298, 1302-03 (9th Cir. 1992)).

In this case, Plaintiffs were seeking money damages pursuant to this court's holding in *Franklin v. Guinett County Public Schools*, 503 U.S. 60 (1992) for Defendants' violation of N.B.'s Federal rights. This implied remedy is simply not available administratively, i.e., the Agency is not "empowered to grant effective relief" and exhaustion is not required. *McCarty v. Madigan*, 503 U.S. 140; (1992)

II.

Is the doctrine of exhaustion of administrative remedies applicable when there is no final administrative decision because the State of Florida closed Plaintiffs' administrative complaint file when Plaintiffs moved to Georgia?

The doctrine of exhaustion of administrative remedies is simply not applicable under the facts of this case wherein Plaintiffs' administrative complaint was abated pending their possible return to Florida at some date in the future. Like Hero's paradox wherein the arrow never reaches the target; Plaintiffs' cause of action would never accrue since the administrative action is still pending.

III.

Is the doctrine of exhaustion of administrative remedies even applicable to Plaintiffs' cause of action pursuant to 42 U.S.C. §1983?

20 U.S.C. §1415(f) provides:

"Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with

> disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter."

The applicability of exhaustion to §1983 cases arising out of violation of the I.D.E.A. was favorably answered by the 3rd Circuit in *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995). In *Matula*, a disabled student's mother sought damages for Defendants "persistent refusal . . . to evaluate, classify and provide necessary educational services" to her son. Plaintiffs filed suit pursuant to the I.D.E.A. and §1983. After determining plaintiffs could recover damages on their I.D.E.A. based §1983 claim, but not under the I.D.E.A. itself, the Court found exhaustion unnecessary via the following rationale: The I.D.E.A. requires that "before the filing of a civil action . . . seeking relief that is also available under this subchapter," a plaintiff must exhaust the I.D.E.A. procedures. 20 U.S.C. §1415(f). Where recourse to an I.D.E.A. administrative proceedings would be futile or inadequate, however, the exhaustion requirement is excused. (Citations omitted)

In the case at bar, it would be futile, if not impossible, for plaintiffs to exhaust their administrative remedies because the relief sought by plaintiffs in this action is unavailable in I.D.E.A. administrative proceedings.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JUNE 7, 1996

No. 95-3214, Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

84 F.3d 1376

June 7, 1996, Decided

N.B. , by her mother and next friend, D.G. a/k/a N.B. , Plaintiff-Appellant, v. ALACHUA COUNTY SCHOOL BOARD, RobertW. Hughes, Superintendent, Alachua County School Board, individually and in his official capacity, Suwannee County School Board, Charles F. Blalock, Jr., Superintendent, Suwannee County School Board, individually and in his official capacity, Columbia County School Board, Diane Lane, Superintendent, Columbia County School Board, individually and in her official capacity, Defendants-Appellees.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Florida. (No. 94-10164-MMP). Maurice Mitchell Paul,Chief Judge.

84 F.3d 1376

DISPOSITION: AFFIRMED.

COUNSEL: ATTORNEY(S) FOR APPELLANT(S): N. Albert Bacharach, Jr., Gainesville, FL.

ATTORNEY(S) FOR APPELLEE(S): Francis H. Sheppard, Esq.,

FRANCIS H. SHEPPARD,
P.A., Orlando, FL.

ATTORNEY(S) FOR APPELLEE(S): (FOR SUWANNEE COUNTY SCHOOL BOARD & CHARLES F. BLALOCK, JR.): John M. Cacciatore, UNGER, CACCIATORE & SWARTWOOD, P.A., Orlando, FL, Gregory David Swartwoodk, -do-.

JUDGES: Before TJOFLAT, Chief Judge, and DUBINA and BLACK, Circuit Judges.

OPINION: PER CURIAM

We affirm the judgment of the district court for the reasons stated in the district court's dispositive order of July 20, 1995, which appears in the Appendix.

AFFIRMED.

APPENDIX

ORDER

This cause comes before the Court upon motion to dismiss plaintiff's first amended complaint by defendants Alachua County School Board and Columbia County School Board (doc. 6). For the reasons stated below, the motion is GRANTED.

BACKGROUND

Plaintiff N.B. is a hearing impaired child. During the relevant time periods, N.B. lived in either Columbia or Suwannee County, Florida. Sometime prior to March 1986, N.B. was bused from her home in Columbia or Suwannee County to attend a special school for hearing impaired children in Alachua County. Plaintiff claims that this decision caused her to be segregated from hearing students. She also claims that the long bus ride caused her to miss a significant portion of class work each school day. N.B. left the State of Florida at the end of the 1992/93 school year and is no longer in the Florida educational system.

N.B. has brought this suit alleging violations of the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. @ 1400 et seq. She seeks compensatory damages under the IDEA (Count I) and 42 U.S.C. @ 1983

(Count II).

In the motion to dismiss, defendants move for dismissal of the first amended complaint based on the following four grounds: 1) the plaintiff has failed to exhaust administrative remedies; 2) the plaintiff's claims are barred by the statute of limitations; 3) compensatory damages are not available under the IDEA; and 4) compensatory damages are not available under 42 U.S.C. @ 1983 for violations of the IDEA. Because the Court finds dismissal is appropriate for plaintiff's failure to exhaust necessary administrative remedies as a prerequisite to filing this action, the Court need not reach the remaining three issues concerning the statute of limitations and the availability of compensatory damages under the IDEA and 42 U.S.C. @ 1983.

DISCUSSION

The IDEA, formerly known as the Education for All Handicapped Act ("EHA"), 20 U.S.C. @ 1400 et seq., provides federal money to state and local education agencies in order to assist them in educating handicapped children, on the condition that the states and local agencies implement the substantive and procedural requirements of the Act. The principal purpose of the
Act is "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet the handicapped child's unique needs, ... [and to ensure] that the rights of handicapped children and their parents or guardians are protected." 20 U.S.C. @ 1400(c).

To carry out these objectives, the IDEA provides procedural safeguards to permit parental involvement in all matters concerning the child's educational program and allows parents to obtain administrative and judicial review of decisions they deem unsatisfactory or inappropriate. Honig v. Doe, 484 U.S. 305, 311-12, 108 S. Ct. 592, 597-98, 98 L. Ed. 2d 686 (1988). Under this scheme of procedural protections, parents are entitled to 1) examination of all relevant records pertaining to evaluation and educational placement of their child, 2) prior written notice whenever the responsible educational agency proposes, or

refuses, to change the child's placement, 3) an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education, and 4) an opportunity for an "impartial due process hearing" with respect to any such complaints. Id. at 312, 108 S. Ct. at 598.

In the event that a party is dissatisfied with or aggrieved by the findings and decisions made after the impartial due process hearing, that party may obtain additional administrative review by the state educational agency. 20 U.S.C. @ 1415(c). If that party is still dissatisfied or remains aggrieved after the administrative appeal, a judicial review is available in either state court or federal court to contest the decisions of the educational agency. Id. @ 1415(e)(2).

"The philosophy of the [IDEA] is that plaintiffs are required to utilize the elaborate administrative scheme established by the [IDEA] before resorting to the courts to challenge the actions of the local school authorities."Ass'n for Retarded Citizens of Alabama v. Teague, 830 F.2d 158, 160 (11th Cir.1987) (citing Smith v. Robinson, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984)). Key reasons for requiring the exhaustion of administrative remedies are as follows: 1) to permit the exercise of agency discretion and expertise on issues requiring these characteristics; 2) to allow the full development of technical issues and a factual record prior to court review; 3) to prevent deliberate disregard and circumvention of agency procedures established by Congress; and 4) to avoid unnecessary judicial decisions by giving the agency the first opportunity to correct any error. Id. The exhaustion requirement, however, is not jurisdictional and therefore ""is not to be applied inflexibly.' " Id. (quoting McGee v. United States, 402 U.S. 479, 483, 91 S. Ct. 1565, 1568, 29 L. Ed. 2d 47 (1971)). The exhaustion of the administrative remedies is not required where resort to administrative remedies would be 1) futile or 2) inadequate. Id. (citing to Smith v. Robinson, 468 U.S. at 1014 n. 17, 1019 n. 22, 104 S. Ct. at 3469 n. 17, 3472 n. 22).

In the amended complaint, plaintiff does not allege that she has exhausted her administrative remedies. Instead, plaintiff argues that exhaustion of administrative remedies is not required in this case because she no longer attends any of the defendant school districts. This argument was squarely rejected in Torrie By and Through Torrie v. Cwayna, 841 F. Supp. 1434 (W.D.Mich. 1994). In that case, an emotionally impaired student and his mother brought an action against a

school district and its employees for alleged violations of IDEA, Rehabilitation Act, false arrest and false imprisonment. The student and his mother neither requested an impartial due process hearing nor filed a complaint with the school district before filing the action. In responding to the school district's motion to dismiss based on failure to exhaust administrative remedies, the plaintiffs argued that exhaustion was not required under the futility exception because they no longer lived in the defendant school district. Reasoning that parents' unilateral act of removing their child from a public school could not excuse their failure to exhaust administrative remedies, the court dismissed the action for failure to exhaust remedies. Torrie, 841 F. Supp. at 1442. The rationale of Torrie is persuasive. If parents can bypass the exhaustion requirement of the IDEA by merely moving their child out of the defendant school district, the whole administrative scheme established by the IDEA would be rendered nugatory. Permitting parents to avoid the requirements of the IDEA through such a "back door" would not be consistent with the legislative intent of the IDEA.

The plaintiff's second argument is equally unpersuasive. The plaintiff argues there is no point pursuing administrative remedies because the defendant school districts lack authority to grant the relief requested, namely money damages. Again, if the plaintiff's argument is to be accepted, then future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant. This goes against the very reason that we have the exhaustion requirement, which is "[to prevent] deliberate disregard and circumvention of agency procedures established by Congress."Teague, 830 F.2d at 160. In fact, courts that considered this argument have all rejected it. SeeBuffolino v. Board of Education of Sachem Central School District, 729 F. Supp. 240, 247 (E.D.N.Y. 1990); Waterman v. Marquette-Alger Intermediate School District, 739 F. Supp. 361, 368 (W.D.Mich. 1990) ("A procedure that may result in any substantial relief is not futile"); Torrie, 841 F. Supp. at 1442. Nor does the fact that the plaintiff also seeks money damages under 42 U.S.C. @ 1983 for violations of the IDEA make any difference. "When parents choose to file suit under another law that protects the rights of handicapped children--and the suit could have been filed under the [IDEA]--they are first required to exhaust the [IDEA]'s remedies to the same extent as if the suit had been filed originally under the [IDEA]'s provisions."Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir. 1987). As the plaintiff has failed to exhaust administrative remedies, the plaintiff may not proceed with her @ 1983 claims for violations of the IDEA.

CONCLUSION

Accordingly, the defendants' motion to dismiss is GRANTED. The Clerk is directed to dismiss the first amended complaint with prejudice.

No. 96-772

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ALACHUA COUNTY SCHOOL BOARD, ROBERT HUGHES, COLUMBIA COUNTY SCHOOL BOARD AND DIANE LANE

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QUESTIONS PRESENTED

I. Is the Petitioner entitled to pursue monetary damages in federal court for alleged violations of the I.D.E.A. when there has been no resort to the administrative remedies provided for in the I.D.E.A. beforehand?

II. May Petitioner avoid the normal requirements of exhausting her administrative remedies under I.D.E.A. by moving out of the state and thus voluntarily abandoning her administrative complaint once filed?

III. May the Petitioner avoid the normal requirement of exhausting her administrative remedies under I.D.E.A. by styling her claim for alleged violations of the I.D.E.A. as an action pursuant to 42 U.S.C. § 1983?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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APPENDIX

Appendix A — Pertinent Portions of the I.D.E.A. 1a

OPINIONS BELOW

The per curiam affirmed decision of the United States Court of Appeals for the Eleventh Circuit is reported at 84 F.3d 1376 and is contained in the appendix filed with the Petition for Certiorari. The unreported opinion of the District Court in this case is contained in the appendix to the decision of the Eleventh Circuit.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 7, 1996. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The Petitioner was given an opportunity by the clerk pursuant to Sup. Ct. R. 14 to correct certain deficiencies in the original Petition filed September 6, 1996. Respondents were advised by the clerk that the case was subsequently docketed by the clerk on November 19, 1996.

STATUTES INVOLVED

This case involves the application of the I.D.E.A., 20 U.S.C. § 1400, *et seq*. The relevant portions of the Act are set forth in the Appendix to Respondents' brief in opposition.

STATEMENT OF THE CASE

N.B. is a fourteen-year-old hearing impaired child who has been hearing-impaired since her birth on May 22, 1982. During the time frame in question, N.B. lived in either Columbia or Suwannee County, Florida, both sparsely populated rural counties in North Florida. As a result, from about March, 1986 forward, N.B. was bussed from her home in Columbia or Suwannee County to attend a special school for hearing-impaired children located within a normal elementary school in neighboring Alachua County, Florida. N.B. continued to attend

Lake Forest Elementary School in Alachua County, Florida until her family moved to Georgia at the beginning of the 1993-94 school year. Each year N.B. attended school in Alachua County, Florida an Individual Education Plan, or IEP, was prepared for her. None of these IEP's were ever administratively challenged by Petitioner who is N.B.'s mother and guardian.

Although it was not alleged in the complaint, or in the first amended complaint, Petitioner asserted for the first time in her motion to alter or amend the order of dismissal that she had in fact filed an administrative complaint with the Florida Department of Education on June 15, 1993. No administrative investigation of this complaint was ever completed or any due process hearing requested or held with respect to any alleged failure to comply with the I.D.E.A. prior to N.B.'s departure from the State of Florida in August, 1993. Instead, Petitioner abandoned any administrative remedies which might have been available to her and over a year later filed an action in the United States District Court in and for the Northern District of Florida seeking money damages against the Respondents.

Respondents, Alachua County School Board, Columbia County School Board, Robert Hughes and Diane Lane moved to dismiss the Petitioner's first amended complaint asserting the following four grounds:

1. The Plaintiff failed to exhaust her administrative remedies;

2. The Plaintiff's claims are barred by the statute of limitations;

3. Compensatory damages, the only relief sought by Plaintiff, are not available under the I.D.E.A.; and

4. Compensatory damages are not available under 42 U.S.C. § 1983 for violations of the I.D.E.A.

In response, Petitioner argued that exhaustion of her administrative remedies was not required because N.B. no longer attends any of the Respondent School Districts and because the administrative agencies lack authority to grant the relief requested, namely money damages.

On July 21, 1995, the Honorable Maurice M. Paul, Chief Judge of the United States District Court for the Northern District of Florida, granted Respondents' motion to dismiss with prejudice. On the same day, judgment was rendered in favor of the Respondents.

Petitioner then filed on or about August 3, 1995, a motion to alter or amend the Court's July 21, 1995 order dismissing Petitioner's first amended complaint with prejudice. In that motion, contrary to the position taken previously before the trial court, Petitioner asserted that she had in fact filed an administrative complaint with the Florida Department of Education on June 15, 1993, and that this administrative complaint was sufficient to overcome the Respondents' failure to exhaust administrative remedies defense. However, prior to resolution of that administrative complaint, Petitioner left the State of Florida and the case was administratively closed by the Florida Department of Education in September, 1993. Based upon this administrative closing of Petitioner's complaint, Petitioner argued before the trial court that there was no final administrative decision to start the 30-day appeal period running such that Petitioner's complaint should not be dismissed on the statute of limitations grounds asserted by the Respondents. Petitioner's motion to alter or amend was denied by the District Court on August 24, 1995 and the appeal process was commenced on September 14, 1995.

On appeal, the United States Court of Appeals for the Eleventh Circuit per curiam affirmed the decision of the District Court.

REASONS FOR DENYING THE WRIT

There is no compelling reason for this Court to grant the Petition for Writ of Certiorari in this case. First, the purported conflicts asserted by Petitioner are nonexistent. Secondly, to the extent that there is any error on the part of the Eleventh Circuit creating the purported conflict, the alleged error is solely a function of the misapplication of a properly stated rule of law to the unusual factual scenario presented in this case. Finally, given the rather unusual factual circumstances of this case, any decision by this Court based upon the facts presented would not likely have widespread and general impact so as to warrant the Court's expenditure of its limited time and resources on this matter.

Petitioner contends that there is a conflict between the decision rendered in this case and the decision of the Ninth Circuit in *Hoeft v. Tucson Unified School District*, 967 F.2d 1298 (9th Cir. 1992). However, upon examination of the two decisions it is readily apparent that there is no direct conflict between the decisions and, in fact, both courts reached similar results in these cases. For example, Petitioner states that the *Hoeft* case stands for the proposition that "[t]here can't be a blanket application of the doctrine and instead there must be an analysis of whether pursuit of administrative remedies under the facts of the given case will further the general purpose of exhaustion and the congressional intent behind the administrative scheme." (Petition at p. 5). However, in the instant case neither the trial court, or the Eleventh Circuit in its per curiam affirmed decision, ruled inconsistently with this proposition. In fact, the trial court quoting previous Eleventh Circuit precedent stated "[t]he

exhaustion requirement, however, is not jurisdictional and therefore 'is not to be applied inflexibly.' " *Association for Retarded Citizens of Alabama v. Teague*, 830 F.2d 158, 160 (11th Cir.) (Petitioner's Appendix at p. 4).

In *Hoeft*, the Ninth Circuit reviewed a decision by the United States District Court for the District of Arizona which had dismissed an I.D.E.A. suit for failure to exhaust administrative remedies. In *Hoeft*, the parents of the disabled students brought a class action suit seeking declaratory and injunctive relief against the School District and the Arizona State Superintendent of Public Instruction. Plaintiffs alleged that Tucson Unified School District had formal, written policies, as well as informal policies, concerning extended school year services which operated to deny children with disabilities an appropriate education in violation of the Act. Plaintiffs asserted that it was not necessary for them to pursue their administrative remedies before going to court in that case because they were bringing a class action which was not appropriate for resolution by administrative means and because plaintiffs were seeking injunctive relief which the state administrative hearing officer was incapable of affording. Nonetheless, after reviewing the reasons for the exhaustion of administrative remedies requirement, the Ninth Circuit affirmed the District Court's dismissal of plaintiffs' case and ruled that exhaustion of Plaintiffs' administrative remedies was required.

In reaching this decision, the Ninth Circuit squarely addressed the issue urged by Petitioners in this case that it would be futile to require plaintiffs to exhaust administrative remedies when the relief sought by the plaintiff is not available in the administrative forum. Not only was the result reached by the Ninth Circuit identical to the result reached by the trial court in this case, the reasoning followed was amazingly similar. The Ninth Circuit stated ". . . the mere fact the complaint is structured

as a class action seeking injunctive relief, without more, does not excuse exhaustion. To hold otherwise would render the I.D.E.A.'s exhaustion requirement meaningless because it could be bypassed merely by styling the challenge a class action for injunctive relief." *Hoeft* at pp. 1308-1309. Compare this reasoning to that of the District Court in the instant case where the Court stated ". . . if the Plaintiff's argument is to be accepted, then future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant." (Petitioner's Appendix at p. 5). Clearly, there is no conflict in the reasoning followed or the outcome reached by the Ninth Circuit in *Hoeft* and the lower courts in this case.

As an alternative conflict with the decision of the Eleventh Circuit constituting grounds for granting certiorari in this case, the Petitioner points to the decision of the Third Circuit in *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995). In *Matula*, the Third Circuit concluded that an action may be brought under § 1983 based on violations of I.D.E.A. and that money damages may be recovered under § 1983 for violation of the act. In addition, the *Matula* court did in that case find that exhaustion was not required in order to pursue the § 1983 claim. However, the basis for the court's decision in *Matula* is not inconsistent with the ruling of the District Court in the instant case. Specifically, in *Matula*, there had been extensive administrative proceedings prior to the federal litigation and these administrative proceedings had, in fact, resulted in certain factual findings and a settlement agreement. In contrast, in the instant case not only had there been no resolution of the I.D.E.A. claims administratively by way of settlement or otherwise, there had been no administrative proceedings of any substance at all. Accordingly, there had been no factual record developed in the administrative forum for the District Court to review or to form the basis for any decision under the I.D.E.A. On the other hand, the court noted in *Matula*, "[t]he factual record has been

developed and an action seeking compensation for the alleged I.D.E.A. violations is now ripe for judicial resolution." *Id.* at 496. Importantly, the Third Circuit did not say that exhaustion of administrative remedies is not required in all § 1983 cases seeking monetary damages for alleged violations of I.D.E.A., but simply ruled that the exhaustion requirement in that particular case was excused based upon the circumstances and facts of that case. The circumstances and facts of the instant case are vastly different.

The rationale and reasons for requiring the exhaustion of administrative remedies in I.D.E.A. based claims was discussed by the District Court, again citing the Eleventh Circuit's decision in *Teague*, *supra*. The key reasons noted by the District Court in the instant case were as follows:

> 1. To permit the exercise of agency discretion and expertise on issues requiring these characteristics;
>
> 2. To allow the full development of technical issues and a factual record prior to court review;
>
> 3. To prevent deliberate disregard and circumvention of agency procedures established by Congress; and
>
> 4. To avoid unnecessary judicial decisions by giving the agency the first opportunity to correct any error.

Teague, at 160. (Petitioner's Appendix at p. 4).

Turning to the *Matula* case, it is apparent that the very

reasons identified by the courts below in this case as warranting exhaustion of administrative remedies were considered by the *Matula* court in reaching its decision. For example, the first reason identified by the trial court, to permit the exercise of agency discretion and expertise, was clearly much less significant in the *Matula* case since extensive administrative proceedings resulting in a settlement of the I.D.E.A. issues had already transpired in that case. Since the agency had already exercised its discretion and expertise in *Matula*, this reason was not a significant basis for refusing to excuse the exhaustion requirement in that case.

As to the second reason identified by the District Court for exhaustion of administrative remedies, the *Matula* court also expressly addressed that reason finding that a factual record had already been developed prior to the District Court's consideration of plaintiff's claims. The third reason, to prevent deliberate disregard and circumvention of agency procedures established by Congress, was also clearly not present in the *Matula* case since plaintiffs in that case had already availed themselves of the administrative remedies at the time that the District Court in *Matula* considered the exhaustion issue.

Finally, the fourth reason identified by the District Court in this case, of avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any error, was not compelling in *Matula* since the administrative tribunal had already considered the plaintiffs' claims and reached a resolution of all nonmonetary I.D.E.A. claims. Moreover, the *Matula* court expressed reservations about whether the administrative tribunal would even be competent to hear plaintiffs' remaining I.D.E.A. based claims since any rights that can be had were already settled, and both parties were required to adhere to that settlement agreement. *Id.* at 496. It should be pointed out that the *Matula* court stated at the outset of its consideration of the

exhaustion issue that ". . . we observe that the exhaustion requirement may not be circumvented by casting an I.D.E.A. claim as a § 1983 action predicated on I.D.E.A." *Matula* at 495.

Given the facts in the *Matula* case which were very different than the facts in this case, and the similarity of the reasoning followed by the District Court in this case and the *Matula* court, it can only be concluded that to the extent that there is any true conflict in the outcome of the cases that this conflict represents merely a misapplication of a properly stated rule of law by one or the other of the two courts. As indicated by Sup. Ct. R. 10, certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. Certiorari should not be granted in this case as a result.

I.

IS THE PETITIONER ENTITLED TO PURSUE MONETARY DAMAGES IN FEDERAL COURT FOR ALLEGED VIOLATIONS OF THE I.D.E.A. WHEN THERE HAS BEEN NO RESORT TO THE ADMINISTRATIVE REMEDIES PROVIDED FOR IN THE I.D.E.A. BEFOREHAND?

Petitioner concedes that in most cases the I.D.E.A. requires exhaustion. However, she argues to this Court that there are exceptions to the exhaustion requirement and notes specifically that exhaustion may be excused when resort to the administrative process would be inadequate or futile. Amazingly, the District Court recited the very same rule of law in its memorandum opinion in this case. (Petitioner's Appendix at p. 4). It is apparent, therefore, that Petitioner's dissatisfaction with the outcome of her federal court claim is simply a product of an asserted misapplication of an admittedly properly stated rule of law. *See* Sup. Ct. R. 10.

Petitioner would seek to circumvent this seeming obstacle to certiorari jurisdiction by suggesting that in this case Petitioner was seeking money damages pursuant to this Court's alleged holding in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028 (1992). To the extent that Petitioner would rely upon the *Franklin v. Gwinnett County Public Schools* case as a basis for seeking certiorari, it should be pointed out that nowhere in the *Franklin* case did the Court even address I.D.E.A., much less conclude that money damages were recoverable under that act and that exhaustion of administrative remedies was not required. In addition, the District Court in this case did not expressly rule one way or the other whether money damages were recoverable under the I.D.E.A such that any alleged failure to allow plaintiff to seek money damages in this case cannot form a basis for review in this Court. Rather, the District Court's decision was predicated upon Petitioner's failure to timely pursue her administrative remedies. To find exhaustion of administrative remedies was not required in this case, would render the comprehensive administrative scheme set forth in the Act meaningless and would simply encourage parties to style their cases in such a fashion as to avoid the administrative process altogether.

II.

MAY PETITIONER AVOID THE NORMAL REQUIREMENTS OF EXHAUSTING HER ADMINISTRATIVE REMEDIES UNDER I.D.E.A. BY MOVING OUT OF THE STATE AND THUS VOLUNTARILY ABANDONING HER ADMINISTRATIVE COMPLAINT ONCE FILED?

As the District Court in this case, and the District Court in *Torrie by and through Torrie v. Cwayna*, 841 F. Supp. 1434 (W.D. Mich. 1994) determined, the parents' unilateral act of removing

their child from the public schools cannot excuse their failure to exhaust administrative remedies before filing suit. As Judge Paul noted in this case, "[i]f parents can bypass the exhaustion requirement of the I.D.E.A. by merely moving the child out of the defendant school district, the whole administrative scheme established by the I.D.E.A. would be rendered nugatory. Permitting parents to avoid the requirements of the I.D.E.A. through such a 'back door' would not be consistent with the legislative intent of the I.D.E.A." (Petitioner's Appendix at p. 5).

Again, we are not dealing with an express conflict between the decision of the District Court, as per curiam affirmed by the Eleventh Circuit, and the decision of any other Circuit Court of Appeals which has considered this exact same issue. In fact, the only Court of which Respondents are aware that has considered this issue has reached the same conclusion as the District Court in this case. *See Torrie, supra.*

III.

MAY THE PETITIONER AVOID THE NORMAL REQUIREMENT OF EXHAUSTING HER ADMINISTRATIVE REMEDIES UNDER I.D.E.A. BY STYLING HER CLAIM FOR ALLEGED VIOLATIONS OF THE I.D.E.A. AS AN ACTION PURSUANT TO 42 U.S.C. § 1983?

The District Court in this case concluded that since Petitioner failed to exhaust her administrative remedies, the Petitioner was precluded from pursuing her § 1983 claims for violations of the I.D.E.A. in federal court. The District Court relied upon the Second Circuit's decision in *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2nd Cir. 1987), for the proposition that "[w]hen parents choose to file suit under another law that

protects the rights of handicapped — and the suit could have been filed under the [I.D.E.A.] — they are first required to exhaust the [I.D.E.A.]'s remedies to the same extent as if the suit had been filed originally under the I.D.E.A.'s provisions." This conclusion is buttressed by the plain language of the Act, which states in relevant part at 20 U.S.C. §1415(f), . . . "before the filing of a civil action under such law seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter." (Respondents' Appendix). It must be recalled, of course, that Petitioner in this case asserts that money damages are recoverable under the I.D.E.A. directly pursuant to this Court's decision in *Franklin v. Gwinnett County Public Schools*, *supra*. Thus it would seem that Petitioner is hoisted on her own petard in that on the one hand she asserts that money damages are, in fact, recoverable under the I.D.E.A. directly, but on the other hand suggests that the exhaustion requirements of the I.D.E.A. should be excused in § 1983 actions for alleged I.D.E.A. violations because monetary damages are not "also available" under the I.D.E.A. Either the monetary damages are available under the Act in which case the plain language of the statute controls, or money damages are not available under the Act, in which case there is absolutely no reason for not pursuing administrative remedies in the first instance.

Finally, the Petitioner would rely upon the *Matula* case discussed previously for the proposition that exhaustion is not required in § 1983 cases. However, as both the District Court in this case and the *Matula* court noted, the exhaustion requirement may not be circumvented by casting an I.D.E.A. claim as a § 1983 action predicated on I.D.E.A. If the Petitioner's argument were accepted, future litigants could simply avoid the exhaustion requirement by asking for relief that administrative authorities could not grant. This would result in the district courts

subsuming the role of administrative agencies with respect to administration of the I.D.E.A. and could potentially result in the district courts becoming full time educators and administrators of the Act. Clearly, this was not the congressional intent, nor would it be appropriate for the federal courts to assume such an intimate role in the administration of public education. *Missouri v. Jenkins*, 115 S. Ct. 2038, 132 L. Ed. 2d 63, 63 U.S.L.W. 4486, 100 Ed. Law Rep. 506; *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 53 L. Ed. 2d 851; *San Antonio Independent School District v. Rodrigues*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — PERTINENT PORTIONS OF THE I.D.E.A.

§ 1400. Congressional Statements And Declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress finds that —

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in

regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

Appendix A

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2) (B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

§ 1415. Procedural Safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to —

(A) an opportunity for the parents or guardian of a child with a disability

to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit —

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or

the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardians native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present compliants with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Appendix A

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsection (b) and (c) of this section shall be accorded —

> **(1)** the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,
>
> **(2)** the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,
>
> **(3)** the right to a written or electronic verbatim record of such hearing, and
>
> **(4)** the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the

advisory panel established pursuant to section 1413(a) (12) of this title).

(e) Civil action; jurisdiction; weapons

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance

of the evidence, shall grant such relief as the court determines is appropriate.

(3) (A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(B) (i) Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency, then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

(ii) The interim alternative educational setting described in clause (i) shall be decided by the individuals described in section 1401(a) (20) of this title.

(iii) If a parent or guardian of a child

described in clause (i) requests a due process hearing pursuant to paragraph (2) of subsection (b) of this section, then the child shall remain in the alternative educational setting described in such clause during the pendency of any proceedings conducted pursuant to this section, unless the parents and the local educational agency agree otherwise.

(iv) For the purpose of this section, the term "weapon" means a firearm as such term is defined in section 921 of Title 18.

(4) (A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No

bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if —

> **(i)** the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;
>
> **(ii)** the offer is not accepted within ten days; and
>
> **(iii)** the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

Appendix A

(F) Whenever the court finds that —

> **(i)** the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
>
> **(ii)** the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or
>
> **(iii)** the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.